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No. 86-450

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 201, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Petitioner asserts that it is entitled to judicial review of the refusal of the General Counsel of the National Labor Relations Board to issue an unfair labor practice complaint.

1. In early 1984, petitioner filed unfair labor practice charges with the National Labor Relations Board against the United Brotherhood of Carpenters and Joiners International Union and the Associated General Contractors of Wichita, Inc., a multi-employer association. The charges alleged that the International Union and the employer association had unlawfully entered into a collective bargaining agreement that bound petitioner. Pet. App. C1-C3.

Following an investigation, the Board's regional director notified petitioner that "[t]here is insufficient evidence to show that either the Employer Association or the Union

violated the [National Labor Relations] Act by entering into a collective-bargaining agreement" (Pet. App. C1). He observed that the International Union's Constitution, which bound petitioner, gave the representative of the International Union "controlling authority to execute a binding agreement with the Employer Association" and that, in addition, the representative "was * * * cloaked with apparent authority to negotiate and execute a collective-bargaining agreement" under the circumstances of this case (*id.* at C2). The regional director also rejected petitioner's claims that the International Union deceived petitioner regarding its intent to sign the agreement and found that the Employer Association did not unlawfully refuse to bargain with petitioner (*id.* at C2-C3). The regional director accordingly declined to issue a complaint in response to petitioner's charges (*id.* at C3). Petitioner appealed to the Board's General Counsel, who upheld the regional director's refusal to issue a complaint "substantially for the reasons set forth in the Regional Director's letter dated April 30, 1984" (*id.* at B1).

The court of appeals unanimously dismissed the petition for review filed by petitioner (Pet. App. A1-A3). The court concluded that it lacked jurisdiction to review the General Counsel's decision not to issue a complaint, observing that "[s]uch decisions are not generally reviewable" (*id.* at A2). The court suggested that judicial review of the General Counsel's decision not to issue a complaint might be available in certain limited situations—if the decision were " 'contrary to a specific prohibition of the Act,' " if it resulted in the violation of constitutional rights, or if it were "wholly without basis in law"—but noted that "[n]one of these situations is present here" (*id.* at A2-A3 (citation omitted)).

2. The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

Section 10(f) of the National Labor Relations Act, 29 U.S.C. 160(f), endows the courts of appeals with jurisdiction to review "final order[s] of the Board." The General Counsel's refusal to issue an unfair labor practice complaint does not constitute a final Board order subject to judicial review under Section 10(f). *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). Nor is the General Counsel's refusal to issue a complaint reviewable in federal district court pursuant to the general grant of jurisdiction over cases raising a federal question (see 28 U.S.C. 1331). The Administrative Procedure Act (APA) specifies that judicial review of agency action is not available when "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). The General Counsel's decision not to issue a complaint is a decision committed to her prosecutorial discretion; judicial review is therefore precluded by Section 701(a)(2). *Vaca* v. *Sipes*, 386 U.S. at 182; see also *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 9.

Contrary to petitioner's assertion (Pet. 5), there is no conflict among the courts of appeals concerning the question presented in this case. Some courts have indicated, in dicta, that the General Counsel's refusal to issue a complaint might be reviewable in particular limited circumstances. See, *e.g.*, Pet. App. A2-A3; *International Association of Machinists* v. *Lubbers*, 681 F.2d 598, 603-604 (9th Cir. 1982); *Bova* v. *Pipefitters & Plumbers Local 60*, 554 F.2d 226, 228-229 (5th Cir. 1977). But those statements are not implicated here because, as the court of appeals observed (Pet. App. A3), this case involves no circumstances that even arguably fall within these purported grounds for review.*

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*The question presented here is unrelated to the questions presented in *NLRB* v. *United Food & Commercial Workers, Local 23*, petition for cert. pending, No. 86-594. That case involves the reviewability of the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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General Counsel's decision to withdraw a complaint pursuant to an informal settlement agreement and the General Counsel's obligation to hold a hearing prior to withdrawing a complaint. Resolution of the issues presented in *United Food & Commercial Workers* does not require reexamination of the settled principle that the General Counsel's refusal to issue a complaint in the first instance is not subject to judicial review; indeed, the question in that case is whether the policies underlying that settled principle also bar review of the General Counsel's decision to withdraw a complaint. Accordingly, there is no reason for the Court to hold the petition in the present case pending the disposition of *United Food & Commercial Workers*.

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